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IN THE

Supreme Court of the United States

October Term—1955

No. 702

UGO ROSSI,

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES J. MARGIOTTI,
720 Grant Building,
Pittsburgh 19, Penna.,
Counsel for Petitioner.

LIONEL GOLUB,
261 Broadway,
New York 7, N. Y.,
Of Counsel.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.
John W. O'Rourke, Jr., 211 Hallock Street, Pittsburgh 11, Pennsylvania,
Allegheny County Representative, Telephone EV 1-8923

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Ugo Rossi, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on February 18, 1955, affirming a judgment of conviction of the petitioner, after a jury trial in the United States District Court for the Second District of New York, on two counts of an indictment charging petitioner and other defendants with conspiracy to violate the narcotics laws, Sections 173 and 174, Title 21, United States Code, and Sections 2553(a) and 2554(a), Title 26, United States Code (Sec. 371, Title 18, United States Code), and with substantive violation of the narcotics laws (Sections 173 and 174, Title 21, United States Code).

Opinions Below
Statement of Jurisdiction
Statutes Involved

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Swan and Medina, Circuit Judges and Dimock, District Judge) entered on February 18, 1955, has not yet been reported and is appended hereto (p. 41).

STATEMENT OF JURISDICTION

1. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1) and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

2. The judgment of the Court of Appeals sought to be reviewed was entered on February 18, 1955.

3. On March 7, 1955, this Court entered an order extending the time to file petition for writ of certiorari until April 6, 1955.

STATUTES INVOLVED

Title 18, *Section* 371, *United States Code.**

Conspiracy to commit offense or to defraud United States.

*Pertinent text of Statutes Involved is set forth in Appendix (p. 38).

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Title 21, *Section* 173, *United States Code.*

Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

Title 21, *Section* 174, *United States Code.*

Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

Title 26, *Section* 2553(*a*), *United States Code.*

Package—General requirement.

Title 26, *Section* 2554(*a*), *United States Code.*

Order forms—General requirement.

QUESTIONS PRESENTED FOR REVIEW

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1. Did the Court of Appeals err in sustaining the conviction of petitioner of conspiracy in connection with the transportation and sale of narcotics and of the substantive violation of the narcotics laws by alleged wilfull participation in a specific transaction which occurred in the City of New York on April 23, 1953, where there was (a) no proof of association between the petitioner and the other defendants named in the indictment prior to April 23, 1953, (b) no proof of any narcotics having been found on the person of the petitioner or in his automobile or in his apartment, on their being searched within an hour after the alleged crime, (c) no proof that the codefendant who allegedly received the narcotics from the petitioner had not had narcotics in his possession prior to entering the automobile wherein petitioner was allegedly seated, (d) no

proof of petitioner's having trafficked in narcotics prior to the date involved, (e) no proof of the petitioner's fingerprints having been found on the brown paper package containing the narcotics, (f) no proof of the fingerprints of Laget, who pleaded guilty, being found on the automobile which was seized by the narcotics agents, and (g) no proof that petitioner had been seen delivering the package of narcotics to the codefendant or that the codefendant had been seen securing the package.

2. Whether the petitioner was deprived of a fair trial by the District Court's admission in evidence, on petitioner's cross examination, of records of conviction of one Ugo Rossi in Palermo, Italy between 1919 and 1925, where the petitioner had denied that he was the defendant named in said records, and where the Government's proof of identity of the petitioner and the Ugo Rossi named in said records was based solely on the very contents of those records.

3. Whether the petitioner was deprived of a fair trial by the District Court's admission in evidence, on petitioner's cross examination, of his application for immigration visa and of his petition for naturalization wherein he purportedly made perjurious statements concealing his alleged conviction of a crime in Italy.

4. Was the petitioner deprived of a fair trial by the District Court's frequent, lengthy, detailed and skeptical examination of petitioner and of key defense witnesses, where such examination was not of the form to elicit information or direct the trial procedure into proper channels but rather to cut into the presumption of his innocence to which the defendant was entitled.

REASONS FOR ALLOWANCE OF WRIT

1. Each of the questions presented herein embodies an important question of federal law which has not been, but should be, settled by this Court.

2. The decision herein sustaining the conviction of petitioner on an indictment charging him with conspiracy to violate the narcotics law and with a substantive violation of the narcotics law departs from the accepted and usual course of judicial proceedings, in that the petitioner was held to answer for crimes for which there was neither direct nor circumstantial evidence of his alleged guilt other than his disputed presence in the vicinity of the alleged crime.

3. The decision herein is at variance and in conflict with the decision of the Ninth Circuit in *Stoppelli vs. United States*, C. C. A. 9th, 1950, 183 F. 2d 391; with the decisions of the Seventh Circuit in the *United States vs. Chiarelli* case, C. C. A. 7th, 1952, 192 F. 2d 528, cert. den., 72 S. Ct. 359, *United States vs. Pisano*, C. C. A. 7th, 1951, 193 F. 2d 355, and *United States vs. Pisano*, C. C. A. 7th, 1951, 193 F. 2d 361; and with the decisions of the Second Circuit in *United States vs. Perillo*, C. C. A. 2d, 1947, 164 F. 2d 645, *United States vs. Toscano*, C. C. A. 2d, 1948, 166 F. 2d 524, *United States vs. Sherman*, C. C. A. 2d, 1952, 200 F. 2d 880, and *United States vs. Cohen et al.*, C. C. A. 2d, 177 F. 2d 523. All of said conflicting decisions hold, in effect, that, in order to sustain convictions of violations of the narcotics laws, there must be affirmative and direct evidence that the person who is alleged to have received the narcotics from the petitioner did not have the narcotics in his possession at the time he made the contact with the alleged inter-

mediary, the petitioner, that the alleged intermediary, the petitioner, had prior associates in the narcotics business, and that the narcotics passed from the intermediary to the seller and/or that the fingerprints of the intermediary were found on the package containing the narcotics.

4. The decision herein sustaining the admission, during the cross examination of petitioner, of records of conviction in Italy of defendants bearing the same name as petitioner with no further proof of the identification of the petitioner as being the same defendant involved in each of said records of conviction has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

5. The decision herein sustaining the admission in evidence, during cross examination of the petitioner, of alleged perjurious statements made by the petitioner in connection with his application for immigration visa and his application for naturalization, consisting of his alleged concealment of conviction of a crime in Italy, departs from the accepted and usual course of judicial proceedings and is a violation of the defendant's rights under the Fifth Amendment of the United States Constitution, in that he was held to answer for a crime for which he had not been indicted.

6. The decision herein sustaining the admission in evidence, during cross examination of the petitioner, of alleged perjurious statements made by petitioner in connection with his application for immigration visa and his application for naturalization, consisting of his alleged concealment of conviction of a crime in Italy, is at variance and in conflict with the decision of the Sixth Circuit in

Little vs. United States, C. C. A. 6th, 1938, 93 F. 2d 401, cert. den. 303 U. S. 644, 58 S. Ct. 643; with the decisions of the Eighth Circuit in *Lennon vs. United States,* C. C. A. 8th, 1927, 20 F. 2d 490, *Eckert vs. United States,* C. C. A. 8th, 188 F. 2d 336; and with the decision of the Second Circuit in *United States vs. Provoo,* C. C. A. 2d., 1954, 215 F. 2d 531. Said conflicting decisions hold, in effect, that acts of misconduct resulting in conviction are not proper subject of cross examination to impeach either an accused or other witness.

7. That the decision herein is at variance and in conflict with the decision of the Second Circuit in *United States vs. Brandt,* C. C. A. 2d, 1952, 196 F. 2d 653, holding that, although a Trial Court may conduct examination of witnesses, it must not ask questions of a defendant and of key defense witnesses not designed to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which the defendant was entitled.

8. The decision herein appears to be in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

Indictment

The indictment contained six counts. Count 1 named all the defendants—Jean Laget, Henry Sauzet, Andrew Alberti, John Doe and Rossi—including the petitioner and charged a conspiracy, under 18 U. S. C. Sec. 371, between January 1, 1951 and the date of the indictment, to violate the narcotics laws, 21 U. S. C. Secs. 173 and 174 and 26 U. S. C. Secs. 2553(a) and 2554(a) (R. 7a-9a).

The remaining five counts charged certain of the defendants with substantive violations of the narcotics laws under 21 U. S. C. Secs. 173 and 174 (R. 10a-11a).

Count 6 charged Jean Laget and Ugo Rossi with selling, concealing and facilitating the transportation of one kilo of heroin on April 23, 1953 (R. 12a).

District Court Proceedings

The defendant Laget, after having first pleaded not guilty on May 14, 1953, thereafter, on February 8, 1954, at the start of the trial, withdrew his plea of not guilty and entered a plea of guilty on all counts (R. 4a). The case was severed as to the defendant Alberti and John Doe on the Government's motion (R. 4a).

After a trial consuming seven court days, before Judge Edward Weinfeld, District Judge, the jury, on February 17, 1954, found the defendants Sauzet and Rossi guilty as charged. On March 16, 1954, petitioner Rossi was sen-

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tenced to imprisonment for five years on Counts one and six, the terms to run concurrently.

The Evidence

The Government's case rested entirely upon the evidence of various agents of the Bureau of Narcotics, Department of Treasury. Most of the evidence centers around contacts made by these agents with defendants Laget and Sauzet and with defendants Laget, Alberti, Sauzet and John Doe. The only evidence whereby the Government seeks to connect petitioner Rossi with both the alleged conspiracy and the substantive offense charged in Count 6 centers around the episode on the night of April 23, 1953, hereinafter set forth in greater detail.[1]

A. *Events Prior to April* 23, 1953

During the period from January 2, 1953 to April 23, 1953, Zurlo and Zirilli, two agents of the Federal Bureau of Narcotics working under cover, on four occasions—January 16 (Count 2), January 28 (Count 3), February 10 (Count 4), and April 8, 1953 (Count 5)—purchased large quantities of opium and heroin from Laget, Sauzet and an unknown person, John Doe.

No proof was introduced showing (a) that petitioner Rossi participated in these transactions, or (b) that petitioner had ever had any association in narcotics transactions before the alleged events of April 23, 1953. The

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[1] The Court in its charge stated:

"If you find that Rossi was not present on April 23 at the time of the delivery of the package with its contents of heroin, *I would say* that you should acquit him, not only on the substantive count but on the conspiracy count as well." (R. 564a)

evidence was uncontradicted that petitioner had been employed as a salesman by an established wholesale grocery firm in Brooklyn, New York, for over twelve years prior to April 23, 1953 (R. 347a, 415a-416a).

Two narcotics agents—Gross and Schrier—testified that they had seen Rossi on various occasions prior to April 23, 1953. Of these two agents only one, Gross, was present and purported to identify Rossi as an alleged participant in the narcotics violation of April 23, 1953 (R. 177a-179a). However, Gross had seen Rossi on two prior occasions: first, about six months prior to April 23, at 191 First Avenue (R. 179a-180a); and second, some three or four months prior to April 23, 1953, when he happened to see him emerge from his residence at 128 St. Mark's Place and drive away. Gross's testimony does not purport to show any relationship or association between Rossi and any one of the other defendants.

Neither does agent Schrier's testimony purport to show any narcotics transactions between petitioner and any one of the other defendants before the alleged events of April 23, 1953. Schrier was not present on April 23, 1953, and, therefore, did not identify Rossi as the alleged participant in the narcotics violation of that date. Agent Schrier testified that, on five occasions prior to April 23, 1953—January 20, January 23, April 14, April 15, and April 17, 1953—in trailing Laget, whom the narcotics agents were keeping under surveillance, he had seen Laget enter an apartment building at 128 St. Mark's Place where petitioner had an apartment (R. 149a-154a). This was a four-story apartment building (R. 192a), containing 20 apartments (R. 417a). On only one occasion—January 23, 1953—did Schrier purport to testify that he had seen

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Laget enter Rossi's apartment (R. 150a-152a). The Government did not claim, through Agent Schrier, that any narcotics transaction of any sort had taken place between Laget and Rossi on any one of these occasions.

However, it is uncontradicted that the events prior to April 23, 1953, are not sufficient to establish petitioner's alleged membership and participation either in the alleged conspiracy (Count 1) or in the alleged substantive violation (Count 6).[2]

B. Events of April 23, 1953

On the morning of April 23, 1953, Agent Zurlo met Laget at 55th Street and Ninth Avenue. Zurlo said that he would have $6500 or $7000 that night and arranged to purchase another kilo of heroin (R. 37a).

Agent Zurlo met Laget that evening, April 23, 1953, at 7:00 p.m., at a restaurant at 332 W. 45th Street. They drove in Laget's car by a circuitous route to 15th Street and Eighth Avenue (R. 37a). After circling the block and as the car arrived at 9th Avenue and 15th Street, Laget saw another car in front of him and said, "There he is now". Zurlo identified this car as a green De Soto, bearing license number QC5689 and that the sole occupant of the car was the driver.

Agent Zurlo testified that the De Soto turned south on Ninth Avenue and stopped in a floodlighted area between 14th and 15th Streets, near a gasoline station located at the southwest corner of Ninth Avenue and 15th Street (R. 38a-39a). Laget then drove his car across Ninth Ave-

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[2] See footnote 1, supra, as to District Court's Charge on this point.

nue and parked it on 15th Street, just west of its intersection with Ninth Avenue (R. 38a). Laget, stating that he would be back in a minute, got out of his car and walked to the green De Soto. Agent Zurlo testified that the door opened, Laget leaned in, and emerged carrying a brown paper bag package (R. 38a). Laget then walked back to his car where Agent Zurlo was sitting, handed Zurlo the package (Exs. 6A, 6B) and received $6500 (R. 38a-40a). Zurlo left Laget's car. Laget then drove his car away west on 15th Street and was taken into custody shortly thereafter by other narcotics agents.

Agent Zurlo then walked towards Ninth Avenue and 14th Street, entered a bar on 14th Street just off Ninth Avenue, and, as he left the bar, saw Sauzet approaching from an easterly direction on 14th Street. Upon Zurlo's instructions, other agents placed Sauzet under arrest (R. 39a).

Agent Zurlo did not claim that he saw the man in the car who the Government contended was the petitioner Rossi. *Zurlo could not and did not identify the driver of the De Soto.* Zurlo did not testify that Laget was not carrying, concealed on his person (Laget was wearing a large overcoat), the brown paper bag package, here involved (Exs. 6A, 6B), before he left his car and walked to the De Soto car.

Agent Zurlo's testimony that he had not previously seen this parcel in Laget's possession (R. 67a, fol. 200) is inconclusive. Zurlo's testimony that the dimensions of a certain package was 16 or 17 inches long and 2 or 3 inches thick (R. 67a) *refers to the size of the package he had observed on Laget's person before they left the restaurant*

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(R. 66a, fol. 197-198) and not the package purportedly received from the De Soto car and delivered to Zurlo.

Neither does the Government claim that the fingerprints of petitioner were identified on the package. Nor does the Government claim to have found Laget's fingerprints on the De Soto car which it seized that night and still has.

Agent Ward testified that he had Laget under surveillance on the evening of April 23, 1953, and that he had trailed Laget and Zurlo from the restaurant until Laget parked his car on 15th Street, on the north side of the street, just off Ninth Avenue. The cab wherein he rode passed Laget's car and parked on the same side of the street, beyond one or two trucks in front of Laget's car. Ward got out of the cab and saw Laget walking on Ninth Avenue in a southerly direction. He followed Laget on foot as he walked toward the De Soto. Ward saw Laget *open* the door of the car on the passenger side and lean into it and he then saw Laget walk back to his car with a package. He testified that as he passed the DeSoto, he "got a look" at the driver but kept on walking to 14th Street. He then turned around and saw Laget walking back toward his car. The De Soto by that time had pulled up to 14th Street and had stopped for a red light. Ward testified that he then crossed Ninth Avenue in an easterly direction, directly in front of the car, and got another look at the driver. He identified the driver of the De Soto as the petitioner Rossi (R. 113a-115a).

Agent Gross—the only identifying witness who claimed to have seen Rossi prior to April 23, 1953—testified that he and another agent trailed Laget's car and Agent Ward's car from the restaurant to the corner of 15th

Street and Ninth Avenue (R. 177a). He then stationed himself at the southeast corner of Hudson and 14th Street (R. 178a). He observed Laget leave his car, walk down Ninth Avenue, open the door of a car which was parked on the west side of Ninth Avenue between 14th and 15th Streets, *get into the car,* and then return to his car (R. 178a). He also testified that he saw the De Soto drive away and stop on Ninth Avenue for the red light. As the car turned left into 14th Street, Agent Gross stepped off the curb and started to cross 14th Street and that, as the car went by him, he saw the driver. He identified the car as having license number QC5689 and the driver as Rossi (R. 179a), whom he had seen twice before (R. 179a-180a).

The purported identification of the De Soto and, particularly, of its driver all occurred at about 7:30 p.m. Between 8:15 and 7:30 p.m., Agent Gross and two other narcotics agents had proceeded to 127 St. Marks Place. There, seated in a green De Soto, with license number QC5689 in front of the apartment building was petitioner Rossi and one Cefalu (R. 180a-181a). *A search of the bodies of Rossi and Cefalu revealed no trace of narcotics.*

The agents then entered and searched Rossi's apartment. *The search of Rossi's apartment also revealed no trace* of narcotics (R. 182a, 192a). Although the agents discovered currency on Rossi's person, Agent Gross admitted that the serial numbers thereon were not those of the marked bills used by the agents in the purchases from Laget and Sauzet (R. 201a, 202a).

C. Sauzet

Defendant Sauzet admitted delivery of certain packages to Zurlo on or about the dates involved, but denies any

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knowledge of the contents thereof. He contended that he was merely acting as an innocent agent for Laget in connection with these deliveries. *Sauzet admitted that he did not know Rossi* and that he had never even seen Rossi until after he was arrested on the evening of April 23, 1953 (R. 256a).

D. Laget

The Government narcotics agents had Jean Laget, one of the defendants, under almost daily surveillance since January 1953 and in fact made a number of substantial purchases of narcotics from him. Although Laget at the start of the trial entered a plea of guilty and—as a co-defendant and an alleged conspirator with petitioner—was available to it as a witness, the Government did not call Laget as a witness to establish its charge against petitioner. It is naive and unrealistic to assume that Laget was "equally" available to petitioner as a witness.

E. Defense—Alibi

Petitioner categorically and completely denied the version of the narcotics agents as to his presence in the car from which the Government contended that Laget received the narcotics on the evening of April 23, 1953. He denied that he knew either Laget or Sauzet. He also denied that either he or the De Soto had been present in the neighborhood of Ninth Avenue between 14th Street and 15th Street on the night in question, or that he ever trafficked in narcotics.

The testimony of Rossi and four other witnesses called by him—Mrs. Eleanor Mantellina, owner of the wholesale grocery company where he had for many years been employed as a salesman, Mrs. Rose Batten, an employee of

the firm, Badinelli, a driver employed by said firm, and Raia, the prospective purchaser of the grocery store—placed Rossi at his place of employment between 7 and 7:15 p.m. (R. 323a-328a, 338a-339a, 346a-349a), and at a grocery store at 13 Rivington Street, where his employer had sent him to meet Badinelli and a prospective purchaser of the store, about 7:20 or 7:25 p.m. (R. 327a-328a, 417a-444a).

Petitioner's alibi was that he had then driven directly from 13 Rivington Street to 127 St. Mark's Place, where he met the witness Cefalu who had come to Rossi to inquire about securing penicillin for his sick daughter in Italy (R. 304a-350a). Both Rossi and Cefalu testified that, after Rossi first went to his apartment, he returned, and that he and Cefalu then sat in the car for about 65 minutes, discussing the obtaining of penicillin for Cefalu's daughter, until the narcotics agents arrived (R. 300a-308a, 417a-444a).

The narcotics agents subsequently made thorough searches of Rossi's car, of the bodies of Rossi and Cefalu (R. 181a), of Rossi's apartment (R. 182a, 192a) and, also, of the apartment of his employer (R. 350a-353a), but found absolutely no trace of narcotics or evidence of trafficking in narcotics.

F. Petitioner's Cross Examination as to Unidentified Records of Convictions

Petitioner on direct examination acknowledged that about 1929 he had been convicted of a political crime in Palermo, Italy, for which he had been sentenced to 5 years imprisonment and thereafter to confinement to the Island of Lambdussa (R. 413a-415a). He testified that he, together with 200 other persons, had been convicted of what

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he termed "a conspiracy against the Fascist regime" (R. 414a).

On cross examination and redirect examination, Rossi denied that he had ever been convicted of any other crime in Italy (R. 456a). The Government then offered in evidence authenticated copies of four convictions of one "Ugo Rossi" in Palermo, Italy, where admittedly the petitioner had lived prior to coming to this country (Exs. 14-14a, 15-15a, 16-16a, 17-17a; R. 478a-482a; 487a-492a). The copies of the records included the one conviction that Rossi had acknowledged (Ex. 14-14a; R. 488a-489a).

Exhibit 15a refers to the conviction in 1925 in Palermo, Italy, of one Ugo Rossi, son of the late Roberto, 23 years of age, of the crime of "complicity corresponding to lesions with weapons." Exhibit 16a refers to the conviction in 1919 in Palermo, Italy, of one Ugo Rossi, son of the late Roberto, 17 years ago, of the crime of "doubly qualified theft due to the number of persons and climbing". Exhibit 17a refers to the conviction in 1920 in Palermo, Italy, of one Ugo Rossi, son of Roberto, 17 years of age, of the offense of "qualified theft for the break and for the number of people into the home and to the damage of Fernandez Chiarina during the night of from the 5th to the 6th of June, 1919. * * * ".

The Government, after petitioner's denial that he was the party involved in the three records of conviction set forth in Exs. 15-17, 15a-17a, *offered no proof of the identity of the defendant therein* as being petitioner other than a similarity in names *of the defendants in the records*, in the names of the alleged father of the defendants, and in the approximate ages of the defendants involved. Further,

the Government offered no evidence as to the type of offenses alleged in said three records of convictions other than found in the records themselves.

The Court denied defendant's objection to the admission in evidence of, and also petitioner's motion to strike, all records of convictions, with the exception of the one relating to the 1929 conviction admitted by petitioner (R. 487a).

Petitioner's alleged prior criminal record and his testimony with respect thereto bore on his credibility. Rossi's credibility was an important factor since his testimony directly contradicted that of Agents Zurlo, Ward and Gross. The admission of these three unidentified records of convictions to affect his credibility was prejudicial.

G. Petitioner's Cross Examination as to Alleged Perjurious Statements in Immigration Records

The Government further developed during the cross examination of petitioner, over his repeated objections (R. 456a-466a), that, acting on advice of his counsel at that time in connection with his status as an alien, he had failed to mention both in his application for a visa (Ex. 12), his certificate of arrival, and in his petition for naturalization (Ex. 13) that he had been convicted of a crime in Italy. The application for a visa (Ex. 12) was admitted over his objection (R. 458a-459a), as were the certificate of arrival and his petition for naturalization (Ex. 13).

On redirect examination, the petitioner explained that he had advised his attorney of the one offense he admitted having committed in Italy (Ex. 14-14a), but stated that his attorney had advised him that he did not have to men-

tion this conviction in his application for visa and in his petition for naturalization because they involved a political offense against the Fascist regime (R. 469a-470a).

The immigration records (Exs. 12, 13) were admitted in evidence although petitioner had not been convicted, or even indicted, for the alleged perjurious statements in said records.

H. Character Evidence

In addition to the corroborating testimony of five witnesses relative to the defense of alibi, the petitioner offered evidence of his reputation for honesty and law-abidingness.

I. District Court's Charge

The Court, in its Charge, submitted to the jury the question of whether Rossi was present on April 23, 1953, at the time of the alleged delivery of the package with its contents of heroin. The Court stated that if the jury so found: "I would say that you should acquit him, not only on the conspiracy count but on the substantive count as well" (R. 564a).

ARGUMENT

I.

The Evidence Was Insufficient to Sustain the Petitioner's Convictions on Either the Conspiracy or Substantive Counts

The decision of the Court of Appeals is at variance and in conflict with its own decisions and the decisions of other Circuits relative to the quantum of proof necessary for conviction in narcotics cases. The Court decided this question on the theory that "It is not necessary for the Government to produce a witness who saw the package containing narcotics handed over . . .". The Court cites *United States vs. Pisano et al.*, 193 F. 2d 355 (C. C. A. 7, 1951, and *United States vs. Parker*, 217 F. 2d 672 (C. A. 2, December 16, 1954). In the *Pisano* case, there was direct proof that the informer had been *searched* by a narcotics agent and given some money with which to buy narcotics prior to the time he reappeared after having been in the presence of one of the defendants, carrying a package, later found to contain narcotics. On all occasions of contact with the alleged sellers, the informer was first searched by the agents and found not to possess any narcotics. Further, there was evidence on one cellophane container which the informer received containing a fingerprint found to be identical with that of the left index finger of Pisano. The Court stressed at 193 F. 2d 360: "That it was *clear* that no narcotics were received by anybody until shortly after the defendants had been present and had been dealt with. . ."

Argument

There is no similarity from the reported facts in *United States vs. Parker,* supra, cited as authority by the Court of Appeals, with the facts in the instant case.

The decision in this case is also at variance and in conflict with the decisions of the Second Circuit in *United States vs. Perillo* (C. C. A. 2, 1947), 164 F. 2d 645, *United States vs. Toscano* (C. C. A. 2, 1948), 166 F. 2d 524, *United States vs. Cohen et al.* (C. C. A. 2), 177 F. 2d 523, and *United States vs. Chiarelli* (C. C. A. 7, 1952), 192 F. 2d 880, as well as with the decision of the Seventh Circuit in *United States vs. Chiarelli* (C. C. A. 7, 1952), 192 F. 2d 528, *United States vs. Pisano* (C. C. A. 7, 1951), 193 F. 2d 355, *United States vs. Pisano* (C. C. A. 7, 1951), 193 F. 2d 361, as well as the decision of the Ninth Circuit in *Stoppelli vs. United States* (C. C. A. 9, 1950), 183 F. 2d 391. In each of these decisions there was *affirmative* and *direct* evidence that the seller (Laget) did not have the narcotics in his possession at the time he made the contact with the alleged intermediary (Rossi). In each case there was *affirmative* and *direct* evidence that the alleged intermediary (Rossi) had *prior associations in the narcotics business.* Further, in each case there was *direct* and *affirmative* evidence that the narcotics passed from intermediary to the seller, and that the *fingerprints* of the intermediary were *found on the package* containing the narcotics.

In the instant case the evidence was insufficient to sustain the convictions under the above cited conflicting decisions of the Second Circuit, Seventh Circuit, and Ninth Circuit, because there was no proof: (a) that the petitioner had ever trafficked in narcotics prior to the alleged events of April 23, 1953; (b) that petitioner had ever been engaged in any association with Laget prior to April 23, 1953;

(c) that there was any trace of narcotics found on petitioner's auto, body or apartment at the time of his arrest; (d) that petitioner's fingerprints were found on the brown paper bag package containing the heroin; (e) that (Laget) the seller, did not have the brown paper bag package on his person before he left agent Zurlo, walked to the De Soto car, leaned in and emerged after allegedly receiving the package from the car or its driver; and (f) that any of the agents Zurlo, Gross or Ward had seen Laget receive or secure such a package from Rossi or the car. In the absence of such proof, the circumstances were as consistent with petitioner's innocence as with his guilt.

The evidence, taken in the light most favorable to the Government, is crystalized to this issue: Whether the evidence of the narcotics agents as to *having seen Laget* (who had not been searched prior thereto and who they could not positively say did not then have the package containing the narcotics in his possession) *approach the auto* in which Rossi was allegedly parked, *and walk away therefrom carrying a brown paper bag containing narcotics* (upon which the fingerprints of Rossi were not found), *which he delivered to Zurlo,* was sufficient to sustain the convictions of the petitioner on either the conspiracy or substantive counts.

That the jurors themselves had serious doubt as to Rossi's guilt is seen in the various requests made by the jury for additional instructions during their deliberations (R. 574a-576a).

It is, therefore, submitted that the decision sustaining the conviction of the petitioner is at variance and in conflict with the decisions of the Second Circuit and other Circuits.

II.

The Trial Court Committed Prejudicial and Reversible Error in Admitting in Evidence to Impeach the Petitioner's Credibility (a) Records of Conviction in Italy of One Named "Ugo Rossi" Where Petitioner Denied that He Was the Defendant Named in Said Records and Where the Government Introduced No Other Proof of Identity than the Very Records Themselves; and (b) Alleged Perjurious Statements Contained in Petitioner's Application for Immigration Visa, Certificate of Arrival and Petition for Naturalization

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The Court of Appeals erred in sustaining the admission in evidence of certain Italian records of conviction and of certain immigration records for the purpose of impeaching the petitioner's credibility on cross examination. Said records related to: (a) the alleged prior convictions of one "Ugo Rossi" between 25 and 35 years prior to 1953, and (b) alleged perjury by Rossi in connection with his application for immigration visa and petition for naturalization.

A. Alleged prior conviction: On the direct examination Rossi admitted that in Italy in 1926 he, together with 200 other persons, had been convicted of a "conspiracy against the Fascist Regime" and sentenced to five years' imprisonment and thereafter to confinement as a political prisoner to the Island Lambdussa (413-415). On cross examination, he denied that he had ever been convicted of any other crimes in Italy (456a). He admitted that his father's name was Roberto Rossi, and his mother's name was Matilda Paterno Rossi, and that he had been born at Palermo, Italy, on December 10, 1901 (466a).

Thereafter, over defendant's objection, the District Court admitted the so-called authenticated copies, and translations, of four records of convictions in Italy of one Ugo Rossi (Exs. 14-17, 14a-17a; 478a-481a, 488a-492a). Although the defendant had acknowledged that he was the Ugo Rossi designated in only one record (Exs. 14, 14a), on redirect examination, Rossi emphatically denied that he had ever been convicted of any other crime but the one which he admitted on direct examination (482a-486a).

Over Rossi's objections, the Court admitted the records of the four convictions into evidence and permitted the Government counsel to read all the translations of such records to the jury. Objection was raised to the admission of these records (Exs. 15-17) on the ground that they, having been denied by Rossi, had not been properly identified as crimes committed by this defendant (478a, 487a, 489a-491a). Defendant's motion to strike all the exhibits, with the exception of the one relating to the conviction admitted by Rossi, from the evidence was denied (487a). The crimes involved included "complicity corresponding to Lesions with weapons" and "qualified theft".

In only the conviction admitted by Rossi was there any direct identification of defendant as the son of Roberto Rossi and Matilda Rossi and as to his birth in 1901. In the other records (Exs. 15-17) the only identification of Ugo Rossi is the reference to said Ugo Rossi's being the son of one Roberto Rossi, late of Palermo, Italy.

Petitioner having denied that he was the Ugo Rossi mentioned in the records, the burden, therefore, was upon the Government to produce evidence that he was the person involved in the records of conviction to which defendant

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had objected. In view of defendant's denial, it was error to leave the question of identification to the jury—a speculative process. Nor did the Government, by proper proof of Italian law, establish the nature of the alleged crimes with the aforesaid unusual names.

Petitioner submits that there was substantial error in the admission in evidence of the three records of conviction of one Ugo Rossi in the Courts of Italy, for the reasons that they were incompetent and that the person named in the records was not proven to be the person on trial. All though prima facie, for the purpose of impeachment, at least, the person named in the record is deemed to be the person on trial, or the witness, as the case may be, on the theory that identity of name is identity of person, such prima facie does not warrant the issue of identity being submitted to the jury after the accused has denied that he was the person named in three of the records. In each of the three records (Exs. 15a-17a) denied by Rossi, the name of the father is given as Roberto, and the age of the defendant named therein varies. After Rossi's denial, the burden was upon the Government, by fingerprints or photographs or detailed descriptions, to prove that the Ugo Rossi on trial was the Ugo Rossi mentioned in those records.

There are certain discrepancies in the identification of the individual named "Ugo Rossi" designated as the defendant in the records of conviction covered in Exhibits 14, 15, 16 and 17. The identification of Ugo Rossi, the defendant-appellant in this case and also the defendant in the record of conviction covered in Exhibit 14, as being the same Ugo Rossi involved in the records of conviction covered in Exhibits 15, 16 and 17 was based, according to the

Government's brief, upon these factors: (a) identical spelling of the defendant's name; (b) the admission that defendant lived in Palermo, Italy, during the period of the various convictions; (c) the admission that the father's name in each of the four convictions was "Roberto"; and (d) that the age of the defendant in each case allegedly corresponds with the then age of the appellant.

The Government based its argument upon certain documents not in evidence—namely that the telephone directory of New York City contains the name of only one Ugo Rossi and the telephone directory for Rome, Italy, lists only four Ugo Rossis, while the current telephone directory for Palermo, Italy, allegedly lists no person of that name. Not only were the foregoing documents never introduced into evidence in this case, but also they are absolutely irrelevant and immaterial. First, the telephone directories are current directories and are not directories printed during the years of the alleged convictions, 1919-1929. Second, it is common knowledge that more than a majority of the residents of even the largest of the Italian cities do not have telephones. In fact, transportation between cities like Palermo and adjacent villages is even today accomplished by donkey.

The burden of proof is upon the Government to establish that the "Ugo Rossi" involved in each of the four records of conviction (Exhibits 14, 15, 16 and 17) is one and the same person. Petitioner submits that, having denied that he is the person involved in the records at Exhibits 15, 16 and 17, he is under no burden to affirmatively establish this point. Certainly, it was within the power of the Government to secure all the necessary details

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of identification—such as fingerprints, photographs, addresses, etc.

Petitioner submits that not only did the District Court err in submitting the question of identity to the jury but also that it erred in admitting into evidence Exhibits 15, 16 and 17 for the reason that they show on their face that the persons named Ugo Rossi could not have been the person named Ugo Rossi involved in Exhibit 14, the record of conviction acknowledged by the petitioner herein:

1. For example in Exhibit 16, the record refers to "Rossi Ugo, a son of the late Roberto, 17 years of age from Palermo" and alleges that the date of the offense was March 25, 1919, and the date of the sentence May 28, 1919. However, Exhibit 17, wherein the date of the offense is alleged as June 5-6, 1919, and the date of the sentence as May 3, 1920, the defendant is referred to as "Rossi, Ugo, son of Roberto, 17 years of age, from Palermo" and to "Rossi Ugo, 18 years of age". These records clearly show that the Ugo Rossi designated in Exhibit 16 was the "son of the late Roberto" whereas the Ugo Rossi named in Exhibit 17 was the "son of Roberto". Assuming the accuracy of the records of conviction, the Ugo Rossi named in Exhibit 16 could not possibly have been the Ugo Rossi named in Exhibit 17.

2. Although reference is made in Exhibit 15 to the "Penal precedents" of one of the defendants involved, and although apparently the appellate opinion referred to the prior criminal records of defendants, nevertheless no mention of any prior criminal record is made in the record of conviction acknowledged by petitioner (Ex. 14). The absence of such past criminal history clearly indicates that

this was the first offense of the Ugo Rossi mentioned in Exhibit 14.

3. Further, each of the cases involved in Exhibits 15, 16 and 17 were tried before the Penal Tribunal of Palermo and were disposed of on appeal before the Court of Appeals of the District of Palermo. In neither Exhibit 17 nor Exhibit 15 is any reference made that the Ugo Rossi involved in each was the same Ugo Rossi involved in the earlier convictions. Curiously, two of the members of the Court of Appeals who sat on the appellate proceedings involved in Exhibits 17 and 15 were Dr. Guidi Guido and Dr. Li Donne Carmela. Certainly, these two members would have taken into consideration the prior criminal record of the defendant in Exhibit 17 if he were the same Ugo Rossi involved in the record at Exhibit 15.

4. In the record of conviction in Exhibit 16, where the date of the offense is alleged as March 15, 1919, the date of sentence as May 28, 1919, and the date of appellate action as August 19, 1919, it is to be noted that on August 1919 the defendant received a five-year suspended sentence. In the record of conviction involved in Exhibit 17, where the date of offense is alleged as June 5-6, 1919, and the date of sentence as May 3, 1920, if the individuals were one and the same, most certainly the Penal Tribunal of Palermo, in imposing sentence, would have specifically taken into consideration that a Ugo Rossi was under a five-year suspended sentence by virtue of the record of conviction in Exhibit 16.

5. The record is uncontradicted that Ugo Rossi served in the Italian military service soon after he was 18 years of age and served for 18 months until about July 1921.

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Therefore, he most certainly could not have been the Ugo Rossi mentioned in Exhibit 17, where the date of offense is alleged as June 5-6, 1919, the *date of sentence as May* 3, 1920 (when he was in the Army) (R. 485a) and the date of the affirmance of sentence as June 17, 1926. In 1919 and 1920, at least, this appellant was in military service and could not have committed the offense involved.

6. This petitioner, in the record of conviction in Exhibit 14, is referred to as "Rossi Ugo, son of the late Roberto, and son of Matilda Paterno, born at Palermo, December 10, 1901". The reference to the petitioner's mother and father, as well as to his specific birth date, indicates that there was an attempt to distinguish this petitioner from other individuals with the same name.

7. In the record of conviction in Exhibit 15, the date of the appellate order reducing the sentence theretofore imposed to imprisonment for four months is given as August 19, 1925. Assuming, as we must, that the Ugo Rossi involved in the record in Exhibit 15 commenced service of his sentence soon after August 19, 1925, he could not have been the same Ugo Rossi involved in the record of conviction in Exhibit 14, where the date of the offense is alleged as November 17, 1925, during the four months of the sentence imposed in the record of conviction in Exhibit 15.

In conclusion, it is respectfully submitted that the records of conviction establish a total lack of proof that the Ugo Rossi involved in the record of conviction in Exhibit 14 was the same Ugo Rossi involved in the records of conviction in Exhibits 15, 16 and 17. It is submitted that, without such proof of identity, the Exhibits involved—Exhibits

15, 16 and 17—should not have been introduced into evidence. This error was plainly prejudicial.

The decision of the Court of Appeals with reference to the quantum of proof necessary to establish identity in such cases is in conflict with the decisions of the Eighth Circuit in *Lau vs. United States* (C. C. A. 8), 13 F. 2d 975, 976, and of the Third Circuit in *Hefferman vs. United States* (C. C. A. 3), 50 F. 2d 554.

Moreover, these records of conviction were inadmissible for the purpose of impeachment of the petitioner for the reason that, even if he is identified as the party mentioned in each of said records, the records pertain to convictions 25 to 35 years prior to the trial. The decisions of the Court of Appeals, in this respect, is in conflict with the decision of the Sixth Circuit in *Henderson vs. United States* (C. C. A. 6, 1953), 202 F. 2d 400, 405.

Petitioner submits that, in view of his denial of identity, the *prima facie* evidence of identity by similarity in name, similarity in name of the defendant's father and similarity in age, was insufficient to submit the question of identification to the jury. The error in admission of said testimony cannot be deemed harmless, for the reason that the jury may not have disbelieved a defendant who admitted having committed a crime against the Fascist regime in Italy in 1926 but could readily disbelieve his testimony if they found that he in fact had committed three additional crimes in Italy not against the Fascist regime and not political in nature. The question of identification should not have been left to the jury with an instruction that they were not to consider this evidence as bearing on defendant's credibility unless and until they first were convinced that the records referred to defendant. The effect of the

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admission of these records upon the minds of the jury is reflected in the length in which the Court of Appeals discussed the details of the records of conviction ("filled with quaint expressions and unfamiliar words."—Medina, C. J).

B. Records of applications for immigration visa and for naturalization: Petitioner further submits that the District Court erred in the admission of testimony designed to establish that he had perjured himself in connection with his application for immigration visa (Ex. 12), and petition for naturalization (Ex. 13), in that he had sworn that he had never been convicted of any crime whereas he had been in fact convicted in 1926 of the crime of "qualified homicide" (456a-458a, 460a-462a, 469a). Because the crime had been committed against the Fascist Regime, Rossi testified that " * * * In my conscience I felt that I had not committed any crime" (463a). The error committed in the admission of these immigration and naturalization records was doubly prejudicial to defendant because shortly thereafter the Court, over defendant's objection, admitted into evidence the records of the three convictions which he had denied having committed (478a-480a).

Clearly such testimony as to alleged unlawful act or conduct in connection with defendant's application for immigration visa and for naturalization were inadmissible in this case. In general, acts of misconduct not resulting in conviction are not proper subject of cross examination to impeach either an accused or other witness: *Lennon v. United States* (C. C. A. Minn. 1927), 20 F. 2d 490; *Little vs. United States* (C. C. A. 6, 1938), 93 F. 2d 401, cert. den. 58 S. Ct. 643, 303 U. S. 644; *Eckert v. United States*

(C. C. A. Neb.), 188 F. 2d 336, 26 A. L. R. 2d 752. See Am. Jur., Witnesses, Sections 687, 754-756.

Prejudice resulting from the admission of Exhibits 12 and 13 was irreparable and, together with the admission of the records of the convictions denied by defendant, could not have helped but seriously affect the defendant's credibility. The jury could readily have disbelieved the testimony of an accused who they believed had committed perjury in connection with his application for immigration visa and for naturalization—even though he had never been charged with such offense and even though his explanation was that the papers had been prepared by an attorney to whom he had revealed said crime.

The decision of the Court of Appeals with reference to the admission of the alleged perjurious statements in defendant's visa and naturalization applications is at variance and in conflict with the recent decision in *United States vs. Provoo* (C. C. A. 2, 1954), 215 F. 2d 531.

Therefore, it is submitted that the Court of Appeals erred in sustaining the Trial Court's admission in evidence of the above records of prior convictions and of visa and naturalization applications (Exs. 12-13, 14-17), for the purpose of impeachment of the accused. That such error was prejudicial and substantial is seen by the detail to which the Court of Appeals went in discussing the convictions in Italy and the immigration records. It is obvious that the jury could easily have convicted the petitioner because of these convictions, which he denied, and because of the alleged perjurious statements in the immigration records. Their admission in evidence necessarily had a terrific impact and reaction on the minds of the jury.

Argument

III. The Trial Court's Excessive Examination of Petitioner and of Key Defense Witnesses Deprived Him of Fair Trial

Perhaps the most vital issue to be determined by the jury in this case was the credibility of the testimony of the narcotics agents as opposed to the testimony of petitioner and his corroborating witnesses as to whether or not he was in the De Soto car on Ninth Avenue, between 14th and 15th Streets, on the night of April 23, 1953. Of course, as argued under Point I, supra, even if the jury found that Rossi was in the car on that evening, the evidence in the case was still insufficient to sustain the convictions because the Government failed to prove that Laget did not have the narcotics in his possession before he approached the car, that Rossi had been engaged in the narcotics business, that traces of narcotics were found on his car, his body or his apartment when he was arrested, and, finally, that his fingerprints were found on the package. Nevertheless, the credibility of Rossi and his corroborating witnesses as to his alibi was the principal issue in the trial. However, their credibility was prejudicially affected by their undue interrogation by the District Court during the trial—the interrogation being both lengthy and skeptical of the accused and of his witnesses.

An examination of the Government's case (R. 13a-222a) shows little, if any, interruption of the examination (especially direct) of the narcotics agents.

The District Court's skeptical and lengthy examination of defense witnesses first appears during the direct examination of defendant *Sauzet* (R. 248a-253a). The cross

examination of *Sauzet* was uninterrupted by the Court. Thereafter, the Court's interrogation continued unabated: *Badinelli* (R. 326a); *Mrs. Batten* (R. 342a-343a); *Mrs. Mantellina* (R. 369a-371a; 371a-372a; 376a-379a; and at 382a-386a, the Court asked her 45 questions directed at showing the inconsistency in her testimony as to the events of the night of April 23, 1953); *Cefalu* (R. 394a; 402a-403a; 405a-406a; 407a-408a).

The District Court interrupted the direct examination of Rossi for the apparent purpose of showing inconsistencies in his testimony and eliciting admissions bearing on his credibility as a witness, particularly in his examination relative to petitioner's earnings (R. 450a-451a).

Then, the Court's disbelief of petitioner became obvious during the Government's cross examination of Rossi relative to the prior convictions of one "Ugo Rossi" (R. 462a-463a). The district Court did not even give defense counsel an opportunity to set forth his objection, but interrupted him and even cross examined defense counsel.

However, the Trial Court's most detailed examination occurred when it cross examined Rossi as to his activities on the night of April 23, 1953. The Court's questioning was designed to destroy the alibi offered by petitioner as his defense. During this examination, the Court asked at least 28 questions designed to show inconsistencies in petitioner's testimony as to the time he arrived at his employer's place of business on that evening. Although the record discloses that petitioner on direct examination had testified as to the time he arrived at the office (R. 438a), the Court gratuitously made the following remark (R. 475a):

"The Court: Now, again I say that I am not altogether certain, but my recollection is that you testified the other day that you didn't know what time you got to Stanhope Street. Is that correct, that you testified to that effect the other day?"

The Court further examined petitioner relative to the records of the alleged prior convictions which he had denied (Exs. 15-17). For example, when the Government counsel was introducing Exhibit 16, the Court remarked (R. 491a):

"The Court: What do you say Rossi's first name was?

Mr. Costiglio: His first name is—

The Court: The first name of Rossi.

Mr. Costiglio: Ugo.

The Court: Say so, please."

The obvious purpose of these questions was to point out the similarity in the name of the party mentioned in that record of convictions with the name of the defendant on trial.

The Trial Court's conduct in this case falls squarely within the prohibition against such conduct laid down by the Second Circuit in *United States vs. Brandt* (C. C. A. 2, 1952), 196 F. 2d 653, in reversing and remanding convictions for using mails to defraud. The Court of Appeals held that where the Trial Judge asked more than 900 questions during 8 days' trial and cross examined several witnesses extensively, including the defendant, and when the questioning appeared to have the purpose of underlining inconsistencies in the defense and of eliciting admissions bearing on the credibility of defense witnesses, the Judge had improperly departed from the impartial attribute to

which the defendants were entitled. The Court of Appeals stated that it was ". . . not called upon to determine which, if any, of the incidents alone might vitiate the result; the cumulative effect, however, was such that the verdict cannot stand. . ."

It is submitted that the activities of the Trial Judge in this case were markedly similar to those of the Court in the *Brandt* case. It would have been futile for defense counsel to have objected to the Court's conduct during the trial for, as stated by Judge Frank in *United States vs. Giallo* (C. C. A. 2d, 1953), 206 F. 2d 207, 212 ". . . if the lawyer objects, he may anger the judge and prejudice the jury against the defendant." It is submitted that, as was true in the *Brandt* case, the record in this case conclusively shows that the partiality, manifest in the Court's examination of petitioner and of the defense witnesses called to corroborate his alibi and in the Court's interjection of cross examination in the course of direct examination, materially aided the Government's case. By his interrogation of petitioner and of defense witnesses, the Court could not help but appear so partisan to the Government's contention as to interfere with and cut into the presumption of innocence to which petitioner was entitled.

The decision of the Court of Appeals holding that the Trial Court's conduct was proper departs from the accepted and usual course of judicial proceedings and deprived him of a fair trial to which he was entitled.

The attitude, skepticism, and tone of inordinate inquiry by the Court must have had its impact upon the jury and affected the deliberations and swayed the minds of the jury. These very elements so obviously injected by the Court,

may well have been the deciding factors in the guilty verdict, despite the jury's manifest doubts indicated by its request for certain information (R. 574a).

CONCLUSION

Wherefore, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of the said Court of Appeals be reversed; and that the petitioner may be granted such other, further and different relief as may seem proper.

CHARLES J. MARGIOTTI,

LIONEL GOLUB,

Counsel for Petitioner.

APPENDIX

I. STATUTES INVOLVED

The statutes provide, in pertinent part, as follows:

Title 18, *Section* 371, *United States Code*

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 21, *Section* 173, *United States Code*

Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the Commissioner of Nar-

cotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Title 21, *Section* 174, *United States Code*

Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.

* * * * * * * *

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall

be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, ch. 100. §2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 252, 43 Stat. 657; Nov. 2, 1951, ch. 666, §§1, 5(1), 65 Stat. 767.)

Title 26, *Section* 2553(*a*), *United States Code*

Package—General requirement.

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

Title 26, *Section* 2554(*a*), *United States Code*

Order forms—General requirement.

It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

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II. OPINION OF COURT OF APPEALS

Before Swan and Medina, Circuit Judges, and Dimock, District Judge.

Defendant Rossi appeals from a judgment of the United States District Court for the Southern District of New York, the jury having returned a verdict of guilty on a conspiracy count and a substantive count of an indictment charging participation in the traffic in narcotics. Edward Weinfeld, Judge. Affirmed.

J. Edward Lombard, United States Attorney for the Southern District of New York (Lawrence U. Costiglio, and George H. Bailey, of Counsel) for appellee.

Charles J. Margiotti, Pittsburgh, Pennsylvania, Benjamin Kronenberg, New York City, and Lionel Golub, New York City, for defendant-appellant.

Medina, Circuit Judge:

Defendant Ugo Rossi appeals claiming that the evidence is insufficient to support his conviction of conspiracy in connection with the transportation and sale of narcotics, and of wilful participation in a particular transaction which occurred in the City of New York on April 23, 1953. Other errors are assigned which we shall discuss to the extent deemed necessary.

As a result of many years of patient preparation a number of government narcotics agents finally got on the trail of some large operators, from whom a number of

substantial purchases were made by the government agents. On April 23, 1953, the defendant, Jean Laget, who subsequently pleaded guilty and has been sentenced to ten years imprisonment by the judge who presided over this trial, was in his automobile with one of the government agents, who was about to make another purchase consisting of one kilo of heroin for $6500. Laget, proceeding by a circuitous route, arrived at Ninth Avenue and 15th Street, he then circled the block and again approached Ninth Avenue and 15th Street. He was evidently waiting for the arrival at this intersection of the person from whom he was to take delivery of the heroin, and presently he said "There he is now," as a green DeSoto car bearing license number QC5689, whose sole occupant was the driver, pulled up near a gasoline station on the west side of Ninth Avenue between 14th and 15th Streets. Laget parked his car, went over to the DeSoto, was seen to open the door, lean in and to return to his car with the package containing the heroin. He then delivered the package to the government agent, received the $6500 and was promptly taken into custody.

The government produced a number of witnesses, each of whom added his bit to the over-all mass of circumstantial evidence, which the government claims justified a finding by the jury that the man driving the DeSoto was Rossi and that Rossi had delivered the package of heroin to Laget when he leaned in through the door of the car. There were a number of government agents in the immediate vicinity and the identification of Rossi was quite sufficient to support the verdict. While no one had searched Laget before he went over to the DeSoto car, he had been with the supposed purchaser for some little time and could not readily

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have concealed a package such as the one later delivered, which contained a kilo of heroin and was 16 or 17 inches long and 2 or 3 inches thick. Moreover, Rossi had been seen with Laget prior to this occasion and at the very residence of Rossi, 128 St. Mark's Place, where, an hour or less after the incident above described, Rossi was found in front of the house sitting in the same automobile, bearing the same license number. The arguments advanced before us on this appeal do not touch the sufficiency of the proofs but only the weight to be given to the various conflicting factors by the triers of the facts. The courts have held again and again in the narcotics cases that it is not necessary for the government to produce a witness who saw the package containing narcotics handed over. See United States v. Pisano et al., 193 F. 2d 355 (C. A. 7, 1951); United States v. Parker (C. A. 2, Dec. 16, 1954). Otherwise it would never be possible to convict those who participate in this despicable business, each of whom is continually on the alert against the possibility of detection and apprehension. Here the evidence far exceeded the minimum required by the application of the rule of circumstantial evidence and the instructions of the trial court on the subject were if anything too favorable to defendant,[1] whose defense was alibi.

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[1] Having covered the law applicable to circumstantial evidence in his main charge, the trial judge added the following, at the request of counsel for defendant, "Circumstantial evidence tending to connect the defendant with the offense charged against him cannot be considered against the defendant unless it points unerringly and unmistakably to the defendant's guilt and excludes any inference of his innocence." See *United States v. Simone et al.*, 205 F. 2d 480 (C.A. 2, 1953); *United States v. Austin-Bagley Corp. et al.*, 31 F. 2d 229 (2nd Cir., 1929), certiorari denied 279 U.S. 863 (1929); *McGuinn v. United States*, 191 F. 2d 477, 479 (C.A. D.C., 1951); *Himmelfarb v. United States*, 175 F. 2d 924, 942 (C.A. 9, 1949), certiorari denied 338 U.S. 860 (1949).

The contention is advanced that defendant was prejudiced by cross examination which revealed perjurious statements in his applications for an immigration visa and for naturalization and also by receiving in evidence admittedly accurate translations of certified copies of records of convictions of various crimes in Italy. As to the records of prior convictions, it is asserted that they are too remote to have any substantial relevancy to the issue of defendant's credibility as a witness in his own defense, and that defendant's denials that the records could have any reference to him was sufficient to exclude them, in the absence of some further identification by way of fingerprints, photographs or the like. The trial court left the question of identification to the jury with an instruction that they were not to consider this evidence as bearing on defendant's credibility unless and until they first were convinced that the records referred to defendant. A scrutiny of the records discloses that these claims are wholly without merit.

At the outset of defendant's direct examination his counsel, after bringing out the fact that defendant was born in Palermo, Sicily, proceeded to question him at some length concerning his convictions "of some offenses or crimes in Italy." This defendant with some gusto described as a conviction in 1926 for a "conspiracy against the fascist regime," and he stated that he was in prison for five years, after which he was taken to the island of "Lambdussa", from which he escaped and came to America. The implication was that he had never been convicted of any other crime and this he vigorously asserted without qualification in his later testimony. It is not clear what was the purpose of opening up this subject but we may assume that it was thought it would help him with the jury,

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because he said he opposed Mussolini and the fascists, or that he wished to anticipate some cross examination as to the part of his life spent in jail.

The cross examination brought out that defendant was born in Palermo on December 10, 1901, and that his father was Roberto and his mother Mathilda. Government counsel turned to the subject of defendant's application at Montreal, Canada, for an immigration visa. This elicited a barrage of objections on the ground that "we are not trying an immigration case here." But the document was received, defendant identified his signature, and it appeared that, despite his testimony on direct examination of the five years spent in prison in Italy, he had sworn in his visa application "that I have never been in prison." His petition for naturalization was then produced, identified and received in evidence, over objection, and, in answer to Question 24, he had sworn that neither in the United States nor in any other country had he ever been arrested, summoned into court as a defendant or "convicted, fined, imprisoned, or placed on probation" for any felony, misdemeanor or other breach of law or ordinance. He could only explain by blaming his lawyer and insisting that "in my conscience I felt that I had not committed any crime."

It is against this background that government counsel produced the sheaf of prior convictions in Italy which ran from petty theft to complicity in premeditated homicide, which turned out to be the crime he had euphemistically described as "a conspiracy against the fascist regime." The certified copies of the record were in Italian and the translations were filled, as they often are, with quaint expressions and unfamiliar words such as one trained in the use of a foreign language might use. But the meanings

are in all cases clear, especially in the light of the extended descriptions of what those charged with the crime in Palermo had actually done.

The story of defendant's long list of experiences with the criminal courts in Sicily begins on the night of March 25, 1919, when he and two of his friends were stealing chickens. Ugo Rossi, described in the record as "son of the late Roberto, 17 years of age from Palermo," was found guilty of doubly qualified theft due to the number of persons and climbing," and sentenced to one year of "continuous cellular segregation," the execution of which sentence was suspended for five years by the Court of Appeals of the District of Palermo, 3rd Penal Section, because of his "minor age" and "good penal precedents." The significance of this, in view of the assurance with which counsel insist that these records of convictions relate to some entirely different Ugo Rossi, is that defendant on redirect examination let it slip out that "two or three years before" 1919, "12 or 13 boys" including himself went out to a farm in the country and "one of those fellows took one chicken," which was "cooked and eaten, and it was not enough for the entire group". He was sure that he was not brought to any court but the boys were taken to the station house and given a talking to.

The facts are all set forth with meticulous care in the Italian records. It seems that young Rossi had two friends, La Rosa and Caracappa. After stealing, not one chicken but enough to fill a sack, La Rosa went ahead carrying the sack and the others followed behind. Unfortunately the patrol came along, apprehended La Rosa with the sack full of "the stolen hens," he confessed at the police station, implicated the other two and they all wound up in jail.

On the 6th of June, 1919, Ugo Rossi and a number of other friends broke into the home of Chiarina Fernandez and stole a number of miscellaneous articles of personal property. In some way Giuseppe Moscato, "a gentleman with a spotless record" became involved, as some of the stolen property found its way into the possession of Moscato and his "lover," Natalina Polimena. As a "gentleman" was involved considerable delay seems to have ensued, but on May 3, 1920, all were convicted, including Moscato and Polimena, and Ugo Rossi was sentenced to two years and six months. He is described as "son of Roberto, 17 years of age, from Palermo." But, perhaps because Moscato was "a gentleman of spotless record," a royal pardon suddenly appeared and Moscato and Polimena got off; the ultimate fate of the others is uncertain.

The next record of conviction naturally leads up to the murder story in the last chapter. Just after midnight on January 17-18-1925, there was a brawl in a restaurant. The lurid details appear fully in the record. Several men were stabbed, but all recovered. The accused, including Ugo Rossi, now described as "son of the late Roberto, 23 years of age, from Palermo", were identified by the victims on the night of the scuffle, but in some way which did not seem strange to the criminal authorities in Sicily, there was a curious reluctance to identify Ugo Rossi at the trial. The owner of the restaurant while recognizing Rossi as "an habitual adventurer," couldn't seem to remember that he was in the restaurant that night. But the judges discounted all this and found Rossi guilty and the accused were all sentenced "to imprisonment for eight months and four days, with the increase of one-sixth of the duration of the continuous cellular segregation", in the cases of

Rossi and one other. This was reduced on appeal to four months. All the jury heard about this knifing in the restaurant was that Rossi had been convicted of "complicity corresponding to lesions with weapons."

The final conviction is the one defendant's counsel insisted on bringing into the case as a five-year jail sentence, "for conspiracy against the fascist regime." It turned out to be in 1929, rather than 1926, there were twenty defendants instead of the two hundred claimed by defendant, nine of them were acquitted and the others, including Ugo Rossi, "son of the late Roberto and son of Mathilda Paterno, born at Palermo, December 10, 1901," were given long prison sentences, depending on the leadership, the firing of the fatal shots and so forth. Two men had been shot to death and another recovered. The crime for which Rossi was convicted is described as "complicity in qualified homicide."

It was clearly proper to probe into the perjurious statements in defendant's visa and naturalization applications; and there is more than sufficient proof to warrant a finding that the defendant and the Ugo Rossi described in the various records were one and the same person. Moreover, his reliance upon our recent decision in United States v. Provoo, 215 F. 2d 531 (C. A. 2, 1954) is misplaced. The very theory of completeness which is discussed in the Provoo case would make proper inquiry into the whole subject of defendant's convictions of crime in Italy, in view of his opening up that subject on direct examination.

Nor is there any merit in the claim that the trial judge improperly interefered with the conduct and progress of the trial. What he did would have been well within his

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powers in any event, but it was absolutely essential in this case, in view of the nature of many of counsel's objections and the general atmosphere of confusion which some of the participants in the trial, and especially the defendant himself, seemed quite adept at creating and spreading. We see no occasion for discussion of defendant's other points.

Affirmed.